FORM NLRB-4477

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Petaluma, California)

PLEASANT CARE CORP. d/b/a
PLEASANT CARE OF PETALUMA 1/

Employer

and

J. ROSARIO MORALES, an Individual

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 250, AFL-CIO,

Union

20-RD-2356 **DECISION AND ORDER**

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer. 3/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act. 4/

ORDER

IT IS HERBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by**. January 7, 2003.**

Dated December 24, 2002

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

1/ The name of the Employer is in accord with the stipulation of the parties.

2/ The parties stipulated, and I find, that the Employer is a California corporation with a facility located in Petaluma, California, that is engaged in providing health care services. The parties further stipulated, and I find, that during the past calendar year, the Employer received gross revenue in excess of $250,000 and purchased services and/or supplies valued in excess of $5,000 which originated outside the State of California. Based on the parties' stipulation to such facts, it is concluded that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

3/ The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act. In this regard, Union Field Representative/Organizer Karen Lachapelle testified that the Union represents employees in the health care industry and administers collective bargaining agreements negotiated with employers. According to Lachapelle, the Union has collective bargaining agreements with Fifth Avenue, Hillside Care Center and La Mariposa in Fairfield, California. Lachapelle testified that employees participate in the Union through bargaining committee meetings and there are employee members on the Union's executive board. Based on Lachapelle's testimony and the parties' stipulation, I find that the Union is a labor organization within the meaning of the Act.

4/ The Petitioner seeks a decertification election in the unit stipulated to by the parties, which is the unit voluntarily recognized by the Employer upon a card check conducted on March 13, 2002. This unit is comprised of service and maintenance employees, including certified nursing assistants, registered nurse assistants, dietary, housekeeping, activities, maintenance employees, excluding other employees, office clerical employees, guards and supervisors as defined in the Act.

The Union contends that the petition is barred by either a recognition bar doctrine or the contract bar doctrine. The Employer and the Petitioner take the opposite position. For the reasons addressed below, I find that no contract bar exists to the processing of the petition but that a recognition bar does exist warranting dismissal of the petition.

Background: The Union's recognition by the Employer resulted in the Union's withdrawal of a petition it had filed in Case 20-RC-17738 on March 1, 2002, to represent the employees in a unit at the Employer's Petaluma facility comprised of "service and maintenance and technical including certified nursing assistants, RNAs, housekeepers, dietary, laundry, maintenance, licensed vocational nurses and activities; excluded office clerical, guards, supervisors and other employees excluded under the Act."

The Employer and the Union began negotiations for an initial collective bargaining agreement for the Petaluma facility in April or May 2002, and the last bargaining session took place in August, 2002. Union organizer Karen Lachapelle testified that she had attended one bargaining meeting and believed that an agreement had been reached in August, 2002, but that it had not been signed as of the date of the hearing. Employer Consultant Ruben Jauregui testified that he had participated in seven or eight bargaining sessions for the Employer, the last of which had taken place in August, 2002. According to Jauregui, they had communicated about six times since August concerning the agreement. Jauregui testified that as of the date of the hearing, the parties were still attempting to reach a final agreement and that there were still outstanding issues concerning, among other issues, language for the shift differential provision and caps on pension fund computations.

The Union's membership ratified the terms agreed to by the parties on August 19, 2002. Thereafter, the Employer implemented agreed upon wage scale and grievance provisions. According to Jauregui, the wage scale was implemented effective July 1, 2002, and the collective-bargaining agreement will be effective retroactively commencing on August 1, 2002. The parties held a step one grievance meeting on November 25, 2002, and had a Board of Adjustment scheduled for December 5, 2002, under the terms of the agreed upon grievance provisions.

The record includes several documents relating to the negotiations and agreements of the parties. Included is a document with signatures of the Employer and the Union representatives dated in March, 2002, titled "Agreement" which states that it is entered into by and between SNF Properties/Pleasant Care d/b/a Emmanuel Convalescent Hospital-Alameda (hereinafter called the Employer) and the Health Care Workers Union, Local 250, SEIU, AFL-CIO (hereinafter called "the Union). The words "Emmanuel and Alameda are lined through and the words handwritten in to replace them are Pleasant Care for Emmanuel and "Petaluma/Napa" for Alameda. The Agreement is signed by both parties in March, 2002, and appears to be a copy of a contract covering the Employer's facility in Alameda California, that was signed in March, 2002, that the parties were using as a working document for reaching an agreement that would cover the Employer's Petaluma and Napa facilities. This Agreement has typed provisions and many line-throughs with handwritten modifications interspersed throughout. It also contains handwritten notations reflecting many tentative agreements initialed by the parties, most of which are dated May 24, 2002, July 12, and August 7, 2002.

The Agreement includes a recognition clause which states that the Employer recognizes the Union as the exclusive bargaining agent for employees covered by this Agreement and further states: "This Agreement shall apply to

employees working in the classifications listed in "Appendix A" and to any other classifications which may be established within the scope of the duties now included within these classifications. Excluded from the bargaining unit are Registered Nurses, office employees and supervisors, as defined in the Labor Management Relations Act of 1947, as amended." In the margin next to the typed recognition clause, a handwritten notation "TA 7/12/02" appears. Also included with this Agreement is a document with a listing of wage rates with a handwritten notation across the top, stating "For Petaluma & Napa Effective July 1, 2002." This listing contains wage rates for "Benefits Employees" and Per Diem Employees, including CNAs, RNAs, housekeeping, laundry, dietary, activities head cook and relief cook.

With regard to the apparent coverage of employees at the Employer's Napa facility in this Agreement, administrative notice is taken of the fact that on April 23, 2002, I issued a Certification of Representative in Pleasant Care Corporation d/b/a Pleasant Care Convalescent of Napa finding that the Union herein was the exclusive collective-bargaining representative in the following unit in which an election had been conducted:

> All full-time and regular part-time service and maintenance employees employed by the Employer's Napa, California facility, including certified nursing assistants, RNAs, housekeepers, dietary employees, laundry employees, maintenance employees, and activities employees; excluding all other employees, office clerical employees, licensed vocational nurses, managers, guards and supervisors as defined in the Act.

The record discloses no evidence regarding whether the parties intended the units of employees at the Employer's Napa and Petaluma facilities represented by the Union to be merged into one unit under this Agreement.

One of the TA's, which is initialed by the parties, is the term of the Agreement, which shows that its effective dates are July 1, 2002, through April 30, 2003.

The Agreement also incorporates a document agreed to by the parties in June, 2001, titled Agreement SEIU Health Care Workers Union Local 250 (Union) & Pleasant Care Corporation (Employer or Company) Fast and Fair Organizing: Employer Neutrality & Positive Union Campaign," which is a neutrality agreement containing the understandings of the parties' concerning the Union's attempt to organize the Employer's facilities, including the Petaluma facility.

Under the Recognition section of the Agreement is a clause entitled, "Master Contract," which states as follows:

> Local 250 and Pleasant Care have agreed to negotiate a master agreement covering all of the company's unionized facilities in Northern California. To that end, the parties will convene a Labor-Management committee which will work toward drafting a master contract for implementation in early 2002, or at any subsequent time as the parties may agree, but in no case later than May 1, 2003.

The record also contains a document transmitted by facsimile from the Employer to the Union dated August 12, 2002. The transmittal memo states as follows:

> Have enclosed a copy of the new Hourly Wage Grid for the Napa and Petaluma facilities. As agreed, this grid will take effect only when and if the state of California expands the current Bay Area Medical rate to include Napa and Sonoma Counties.
>
> The enclosed wage grid includes the typed notation that it will be used for "the Napa and Petaluma facilities upon approval of Bay Area Reimbursement Rates for these facilities by the Medi-Cal program. Effective dates for the rates shall be the date of receipt of actual payments." A handwritten notation apparently initialed by the Employer's representative reads: "For Pleasant Care August 12, 2002."

Another document in the record is a memorandum transmitted by facsimile from the Employer to the Union dated August 16, 2002, stating "Have enclosed PCC's response to Mark Kipfer's letter and accompanying document regarding the Tentative Agreements reached between Local 250 and PCC for the Napa and Petaluma facilities. Should you have any questions please contact me. . . ." Also included on this memorandum is a handwritten notation, which reads, "Sorry Diane, found a couple of typos on the first one. Please replace the 1st one I sent with this superseding version. Thank you." The attached memorandum dated August 16, 2002, from the Employer to the Union is entitled "Petaluma and Napa TA' s." It includes changes in language for six provisions. It also includes the statement that:

> As far as I can see all of the other provisions are preliminarily correct. It's difficult to make a final determination because we don't yet have the benefit of a completely worded formal agreement, only this summary. While PCC is agreeing as indicated, it is with the proviso that PCC reserves the right to engage in additional discussion and language refinement which may be required

> once the actual fully worded document is submitted to PCC for its review.

The record also contains a document with no date which the Union represented was sent to the Employer by the Union sometime after August 19, 2002, which states:

> I am sending a summary of our agreement for your review. This is the contract summary that we intend to use at our ratification meetings at the Napa and Petaluma facilities. I believe that the only subjects still in question involve the sick leave and cash-out provision, the "Bay Area" wage rates for the housekeeping and dietary classifications and the effective date of the "Bay Area" wage scale.

Although the document makes reference to a summary of the agreement being sent by the Union, no summary of the agreement is attached to this document or included in the record.

Included in the record is an undated memorandum from the Union to the Employer, which states that the Agreement was ratified at both the Napa and Petaluma facilities of the Employer on August 19, 2002, and requesting that the Employer implement the provisions of the Agreement.

The record also includes a letter dated October 1, 2002, from the Union to the Employer which states that it is enclosing a complete contract for the Employer to review and execute. However, there is no copy of the contract attached to or included with this letter in the record.

Finally, the record includes a two-page letter dated October 9, 2002, from the Employer to the Union with proposed changes in the language of the agreement received by the Employer. In its letter, the Employer describes these changes as being "typographical in nature, in need of modification for the sake of clarity or of a substantive nature in need of supporting documentation or clarification."

Whether A Contract Bar Exists. It is well settled that in order to serve as a bar to the filing of a petition, a contract must be signed by all parties prior to the filing of the rival petition. *De Paul Adult Care Communities, Inc.,* 325 NLRB 681 (1998; *Appalachian Shale Products Co.,* 121 NLRB 1260, 1162 (1958). There is no requirement that the parties execute a printed, final contract. Rather, as stated by the Board in *Seton Medical Center*, 317 NLRB 87 (1995), "The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement

and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing of their signatures." This does not mean that contracts must be formal documents or that they cannot consist of an exchange of a written proposal and a written acceptance. *Georgia Purchasing,* 230 NLRB 1174 (1977). It does mean, however, that in such instances, the informal documents that are exchanged must be signed by all of the parties in order to serve as a bar to an election. *Appalachian Shale Products Co*., 121 NLRB 1160 (1958); *Yellow Cab*, 131 NLRB 239 (1961); and *United Telephone Co. of Ohio*, 179 NLRB 732 (1969). Similarly, the documents must establish the identity and the terms of the agreement. See *In re Pontiac Ceiling & Partition Co., L.L.C*., 337 NLRB No. 16 (December 20, 2001); *Branch Cheese*, 307 NLRB 239 (1992).

In the instant case, it is undisputed that the Employer and the Union have never executed a final agreement. While they have exchanged documents that on their face set out or refer to their tentative agreements, the evidence in the record is insufficient to establish that their exchange of signed or initialed documents constituted a final agreement unambiguously identifying all of its terms by the time the petition was filed in November, 2002. The fact that the employees ratified what the Union presented to them as a summary of the agreement in August, 2002, or that the Employer thereafter implemented certain of its terms cannot serve as a substitute for the lack of written signed documentation evidencing a final agreement. *Seton Medical Center, supra.*

Accordingly, I find that the record is insufficient to establish a contract bar in this case and the petition will not be dismissed on this basis.

I note that the documents in the record suggest that the new agreement will cover both the employees at the Petaluma and the Napa facilities of the Employer. However, it is unclear from the evidence in the record whether it is the parties' intent that the employees in these two separately recognized units are to be merged into a single unit covered by the Agreement. If a contract had been entered into by the parties, then the issue would be raised as to whether the petition, which is limited to only the employees at the Petaluma facility, would be co-extensive with the recognized unit under the contract as is required for the processing of a decertification petition. However, given that I have concluded that the evidence is insufficient to establish the existence of a contract, I need not reach that issue here.

Whether A Recognition Bar Exists. The Union contends that the instant petition is barred by the Board's recognition bar doctrine and the Employer and the Petitioner take the opposite position. For the reasons cited below, I find that a recognition bar exists to the petition in the instant case.

It is well-established that where an employer has voluntarily recognized a union as the representative of its employees in good faith and based on a demonstrated showing of majority status, that recognition serves as a bar for a reasonable period of time to allow the parties to bargain free from challenge to the union's majority status. What constitutes a "reasonable time," is not measured by the number of days or months spent in bargaining but by what has transpired and what has been accomplished in the bargaining sessions. *MGM Grand Hotel, Inc*., 329 NLRB 464 (1999); *Livent Realty, a Division of the Livent, U.S., Incorporated, d/b/a the Ford Center for the Performing Arts*, 328 NLRB 1 (1999); *Royal Coach Lines,* 282 NLRB 1037, 1038 (1987). In determining whether a reasonable time has passed, the Board examines the factual circumstances unique to the parties' recognition and bargaining to determine whether, under the circumstances, the parties have had sufficient time to reach agreement. In so doing, the Board looks to the degree of progress made in negotiations, whether or not the parties were at an impasse, and whether the parties were negotiating for an initial contract. In particular, where the parties are negotiating a first contract, the Board recognizes the attendant problems of establishing initial procedures, rights, wage scales, and benefits in determining whether a reasonable time has elapsed*. Id; N.J MacDonald & Sons, Inc*., 155 NLRB 67, 71-72 (1965). In this regard, the Board has held that a recognition bar existed in a situation where the parties had been negotiating a new contract for a period of eight or nine months. See *The Ford Center for the Performing Arts, supra*; *Blue Valley Machine & Mfg. Co*., 180 NLRB 298, 304 (1969).

In the instant case, the Employer voluntarily recognized the Union on March 13, 2002. At the time that the petition was filed on November 13, 2002, they had been negotiating for only eight months. As shown above, they had made substantial progress in that time towards reaching a final executed contract. The Union had ratified the agreement and the Employer had even implemented certain of its terms. Accordingly, I find that the instant petition is barred by the recognition bar doctrine and I will dismiss the petition on that basis.

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